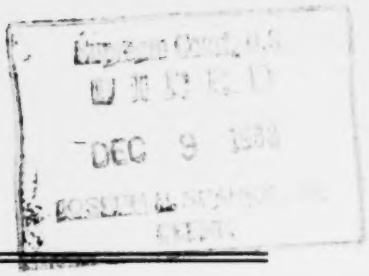

No. 88-596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner,*

v.

CITY OF AKRON, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

I.

Respondent states in its opposing brief that the Supreme Court is without jurisdiction to hear this case because petitioner "referred to the equal protection clause fleetingly in its arguments to the trial and intermediate appellate courts" (Res. Brief at 7). These fleeting references are reproduced in the appendix to this reply brief (pp. 1a to 8a, *infra*), comprising eight pages after being edited to remove the discussion of the factual issues involved. This Court has jurisdiction to review the decision of the Ohio Supreme Court because "the record as a whole shows either expressly or by clear implication that the federal claim was adequately

presented in the state system." *Webb v. Webb*, 451 U.S. 493 at 496-497 (1981).

Respondent also emphasizes the fact that petitioner did not raise a federal issue in the Ohio Supreme Court until the motion for rehearing. There are two good reasons for this, neither of which defeats this Court's jurisdiction. First, petitioner prevailed upon the federal issue in the court of appeals and respondent failed to appeal it to the state supreme court. Second, the Ohio Supreme Court rendered a decision which unexpectedly reversed the federal issue not before the court.

The constitutional issue in question arose from petitioner's third assignment of error to the court of appeals (p. 7a, *infra*) which stated:

> The trial court erred upholding the discriminatory water rate contrary to law and the equal protection standards required by the Ohio and United States Constitutions.

The court of appeals sustained this assignment of error and remanded the case to the trial court for further proceedings (p. 11a, *infra*). Respondent accepted this holding and did not raise, argue or brief the issue in its appeal to the Ohio Supreme Court. Since the federal issue had been disposed of by the intermediate appellate court, it was not necessary for petitioner to raise the issue before the state supreme court in order to obtain review by this Court. *Urie v. Thompson*, 337 U.S. 163, 172 (1949); *Reece v. Georgia*, 350 U.S. 85, 86-87 (1955).

Unfortunately, the Ohio Supreme Court issued a syllabus and opinion containing holdings neither briefed nor argued by either party. Its decision reversed the unchallenged holding of the court of appeals and extinguished petitioner's federal equal protection rights

sub silentio. Petitioner's request for a rehearing to specifically address the denial of federal equal protection rights was refused.

Respondent maintains that petitioner has forfeited the right to seek review of this decision because it did not have the prescience to know that the Ohio Supreme Court would decide an issue not before it. Federal law is not so demanding.

> There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.
> *Herndon v. Georgia*, 295 U.S. 441 at 444 (1935).

Nevertheless, respondent suggests that this Court has no authority to review the Ohio Supreme Court's denial of federal equal protection rights simply because that court refused to discuss federal issues. Were this true, state courts could avoid review of decisions impacting upon federal rights merely by omitting references to the issues involved. This has not been permitted in the past and should not be countenanced now. *See Neilson v. Lagow*, 12 How. 98, 110 (1851).

II.

Respondent asserts that petitioner has overlooked the fact that a political subdivision cannot obtain Fourteenth Amendment protection against its creator state. Petitioner is aware of this fact but also aware that the prohibition is based on the Eleventh Amendment and applies only to suits brought in federal court. It is respondent who has overlooked an important fact -- namely, that petitioner's claims were not raised against its creator state and were not brought in federal court.

In any event, the cases cited by respondent to support its position (Res. Brief at 9) hold only that a political subdivision cannot challenge a state statute or be challenged for acting on the basis of a state statute in federal court. In the present case, (1) petitioner was not challenging a state statute, (2) respondent was not acting on the basis of a state statute, and (3) the case was not brought in federal court. Moreover, as noted in the dissent to the denial of certiorari in *City of South Lake Tahoe v. California Tahoe*, 449 U.S. 1039 (1980), the issues raised by political subdivisions bringing federal claims in federal court are important and have received conflicting answers in the courts of appeals.

Nowhere is this conflict more obvious than in *South Macomb Disposal Authority v. Township of Washington*. 790 F.2d 500 (6th Cir. 1986) and *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968). Both cases involved suits between political subdivisions in which Fourteenth Amendment claims were presented. The following quotes illustrate the opposite conclusions reached by the two circuits:

> We hold that a municipal corporation like any other corporation is a "person" within the meaning of the fourteenth amendment and is entitled to its protection.
> *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 at 686 (2nd Cir. 1968).

> Therefore, the Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision.
> *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 at 505 (6th Cir. 1986).

The harmony between these cases alluded to by respondent is nonexistent. As further proof that the issue is not well settled, a different panel of the sixth circuit, in an earlier decision, permitted one Ohio political subdivision, the Akron Board of Education, to raise Fourteenth Amendment claims against another political subdivision, the Ohio State Board of Education:

> We have no doubt concerning the jurisdiction of the District Court to hear and decide a case asserting facts which, if true, would represent a violation of the Fourteenth Amendment.
> *Akron Board of Ed. v. State Board of Ed. of Ohio*, 490 F.2d 1285 at 1292 (6th Cir. 1974) *cert. denied*, 417 U.S. 932.

See also Board of Education v. Allen, 392 U.S. 236 (1968).

Finally, there is the concurring opinion in the case cited by respondent in support of its statement that a political subdivision has no constitutional rights against another political subdivision in federal court:

> Judge Contie holds that, because the federal constitution affords no protection to municipal corporations as against the power of the state to control them, it must therefore follow that the constitution affords no protection to a municipal corporation as against the acts of another political subdivision of the same state. In my view, this conclusion does not necessarily follow as a matter of logic because, unlike the states, municipal corporations do not enjoy Eleventh Amendment immunity under *Monell*.
> *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 at 506 (6th Cir. 1986).

Clearly, this is an area of law which is not settled with respect to the right of political subdivisions to bring federal claims against other political subdivisions in federal court. It is certainly not settled with respect to the same claims brought in state court.

CONCLUSION

The record set forth in the appendix clearly shows that petitioner's federal claim was adequately presented in the state system and, thus, is eligible for review. Petitioner was not required to brief the federal claim in the Ohio Supreme Court since the issue was not appealed to that court by respondent. When surprised by that court's decision on this issue, petitioner promptly moved for a rehearing on federal grounds. The state court's decision should be reviewed by this Court to determine if rights protected by the United States Constitution have been impermissibly denied and to resolve whether political subdivisions may assert such rights against other political subdivisions in state courts.

Respectfully submitted,

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APPENDIX

Trial Brief - County of Summit
Summit County Court of Common Pleas
Case No. CV 81-4-989
(filed January 20, 1982)

* * *

A. THE WATER RATES CHARGED IN THE MAY 19, 1979 AGREEMENT DISCRIMINATE AGAINST THE COUNTY WITH RESPECT TO SIMILARLY SITUATED USERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

Article I, section 2 of the Ohio Constitution states as follows:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

This section has been held to mean that all legislation must apply alike to all persons within a class and any distinctions between members of a class must be made on reasonable grounds. *State v. Buckley*, 16 Ohio St. 2d 128 (1968). Similarly, section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of the [sic] life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutional provisions govern and restrict a municipality's broad authority to operate a public utility under sections 4 and 6 of Article XVIII of the Ohio Constitution.

* * *

In the present case, there are four basic classes of users comprising the Akron water system, each with its own rate:

1.	City of Akron resident customers	Akron rate
2.	Nonresident retail customers (Fairlawn, Mogadore, part of Northampton Township)	Akron rate + 60%
3.	Nonresident industrial customers (Chrysler, General Motors)	Akron rate + 50%
4.	Nonresident wholesale customers (Tallmadge, County of Summit)	Akron + 10% (Tallmadge) Akron + 105% (County of Summit)

With minor exceptions, each member of the first three classes pays the same rate as the other members of its class. However, it can be seen that the two members of the fourth class (nonresident wholesale customers) pay rates which are not even remotely similar. Tallmadge's rate of Akron + 10% is the lowest of all the nonresident users while the County's rate of Akron + 105% is the highest of all nonresident users. The constitutional

provisions quoted above require that there be reasonable grounds for such a disparity.

* * *

(Trial Brief at 14-15)

Brief of Appellant
Ninth District Court of Appeals
Case No. 11169
(filed August 29, 1983)

* * *

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN UPHOLDING AKRON'S RATE DISCRIMINATION BETWEEN TALLMADGE AND THE COUNTY SINCE IT IS NOT BASED ON THE COST OF SERVICE NOR DOES IT FURTHER A LEGITIMATE LEGISLATIVE PURPOSE.

A municipality's authority to operate a public utility is subject to the Ohio and United States constitutional restrictions against unjust discrimination. *State ex. rel. Mt. Sinai Hospital v. Hickey* (1940), 137 Ohio St. 474. These restrictions are not abrogated by Sections 4 and 6 of Article XVIII of the Ohio Constitution and cannot be avoided by contract.

* * *

Equal protection of the law is a fundamental right granted by both the Ohio and federal constitutions. The equal protection provisions of the Ohio and United States constitutions are substantially the same (Appendix 3), and Ohio courts have traditionally followed federal equal protection analysis. *Kinney v. Kaiser Aluminum and Chemical Corp.* (1975), 41 Ohio St. 2d 120. With regard to discrimination not involving suspect classifications or fundamental rights, the United States Supreme Court has employed a rationality standard. The Court will review:

1) whether the challenged distinction rationally furthers a legitimate, articulated municipal purpose; 2) whether the purpose is the one in fact intended by the legislative branch; and 3) whether that purpose is rationally furthered by the legislative means adopted. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *McGinnis v. Royster*, 410 U.S. 133 (1973).

* * *

Given these restrictions, classifications which promote the social welfare are the most common forms of federally approved discrimination. *Richardson v. Belcher*, 404 U.S. 78 (1971).

* * *

The cases on the federal and state level demonstrate that discrimination will be permitted only where there is a difference in the cost of service or where it promotes a valid legislative purpose. Thus, the present case must be examined to determine if the admittedly discriminatory rate structure is either based on the cost of service or promotes a valid legislative purpose. If it does not fulfill either of these conditions, it cannot stand.

* * *

The effect of the trial court decision is to create a distinction between those wholesale users who might develop an alternative water source, but do not have written water contracts, and those who might not develop a water source and do have a written contract. No such reasonable objective was disclosed at trial to justify the classification. Furthermore, it does not meet the requirements established by the Ohio and United States Supreme Courts that such a classification be based upon the cost of service or upon a legitimate legislative purpose. By these standards, the trial court clearly erred in its determination that there is no illegal discrimination in the rates charged by Akron to Tallmadge and the County.

* * *

CONCLUSION

* * *

I

The federal and state equal protection clauses prohibit rate discrimination except where it is based on differing costs of service or where such discrimination furthers a legitimate legislative interest. The experts and other witnesses of both sides agreed that there was no difference between Akron's cost of serving Tallmadge and Akron's cost of serving the County. No evidence was presented by the City to indicate that the discriminatory rate furthers a legitimate interest or promotes the social welfare.

The trial court's decision in favor of Akron's admitted rate discrimination did not address the law applicable to the equal protection argument raised by the County. The court's reliance upon the possession of water contracts and alternative water sources is not supported by the evidence and such factors do not relate to the cost of service or the furtherance of legislative interests.

The City's suggestion that rate discrimination is needed to keep Tallmadge as a customer is equally invalid as a justification for the denial of equal protection. It may not base its water rates upon the value of service to the customer. Even if keeping Tallmadge as a customer were a legitimate interest, it could be accomplished without discrimination by simply serving the County at the Tallmadge rate.

As a matter of law, Akron's rate discrimination between Tallmadge and the County violates Article I, Section 2 of the Constitution of the State of Ohio and the 14th Amendment to the Constitution of the United States.

* * *

(Brief of Appellant at 6-9, 14, 30-31)

Reply Brief of Appellant
Ninth District Court of Appeals
Case No. 11169
(filed September 30, 1983)

* * *

Finally, the City claims that by signing the water agreement, the County has waived its right to challenge the rate differential. This argument was not made at the trial court level and no evidence to support it was produced at trial. The waiver of federal constitutional rights is governed by federal standards. *Boykin v. Alabama*, 395 U.S. 238 (1969). In civil as well as the criminal area, courts indulge every reasonable presumption against the waiver of rights. *Fuentes v. Shevin*, 407 U.S. 67 (1972). For a waiver to be effective, it must be clearly established that there was an intentional abandonment of a known right or privilege. *Brookhart v. Janis*, 384 U.S. 1 (1966).

* * *

In the present case, none of the requisites of waiver exist. The agreement does not state that the County waives it [sic] right to equal protection guaranteed by the Ohio and United States Constitutions. There is no consideration for the relinquishment of these rights. Furthermore, such a waiver would violate public policy since it subjects the County's water customers to unreasonably high and discriminatory rates. But even if the water agreement contained a specific, enforceable waiver of the County's constitutional rights, it would still be invalid since the County cannot waive the rights of its customers without their specific consent. For these reasons, the County has not waived its right to challenge the legality of Akron's water rates.

* * *

(Reply Brief of Appellant at 6-7)

Brief of Appellant
Ninth District Court of Appeals
Case No. 12755
(filed September 8, 1986)

* * *

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED UPHOLDING THE DISCRIMINATORY WATER RATE CONTRARY TO LAW AND THE EQUAL PROTECTION STANDARDS REQUIRED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

A municipality's authority to operate a public utility is subject to the Ohio and United States constitutional restrictions against unjust discrimination. *State ex rel. Mt. Sinai Hospital v. Hickey* (1940), 137 Ohio St. 474. These restrictions are not abrogated by Sections 4 and 6 of Article XVIII of the Ohio Constitution and cannot be avoided by contract. *Western Reserve Steel Co. v. Village of Cuyahoga Heights* (1928), 118 Ohio St. 544.

* * *

Equal protection of the law is a fundamental right granted by both the Ohio and federal constitutions. The equal protection provisions of the Ohio and United States Constitutions are substantially the same, and Ohio courts have traditionally followed federal equal protection analysis. *Kinney v. Kaiser Aluminum and Chemical Corp.* (1975), 41 Ohio St. 2d 120. With regard to discrimination not involving suspect classifications or fundamental rights, the United States Supreme Court has employed a rationality standard. The Court will review: 1) whether the challenged distinction rationally furthers a legitimate, articulated municipal purpose; 2) whether the purpose is the one in fact intended by the legislative branch; and 3) whether that purpose is rationally furthered by the legislative means adopted. *Weinberger*

v. Wiesenfeld (1975), 420 U.S. 636; *McGinnis v. Royster*, (1973) 410 U.S. 133.

* * *

Akron's classification system is not related to the cost of service and does not promote a valid legislative purpose. It is instructive that even the trial court in its decision could not make the finding urged upon it, that a difference in classification existed. Such classification does not reflect lawful conditions which justify the rate differential based upon logic and equity, and is arbitrary, unreasonable, and violates the equal protection guaranteed by the Ohio and United States Constitutions. For this reason, this Court should reverse the judgment of the trial court and render judgment in favor of the County.

* * *

(Brief of Appellant at 14-15, 20-21)

Decision and Journal Entry
of the Court of Appeals
Case No. 12755
(Filed April 8, 1987)

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, J.

Summit County appeals a trial court's order upholding a water service contract between the county and the City of Akron. We reverse the judgment of the trial court and remand this cause for further proceedings according to law on the other relief sought by the county.

The facts of this case are extensively discussed in *Fairway Manor, Inc. v. Akron* (1983), 13 Ohio App. 3d 233. Briefly, Akron and Summit County entered into a

water service contract in 1979. Under the terms of the contract, Akron must provide Summit County with water and charge the county according to a contractual rate schedule. This rate schedule is based upon the "Akron rate" plus a surcharge percentage. The "Akron rate" is the rate paid by similar users within the city limits. Summit County contends that the contractual rate schedule is unjustly discriminatory.

Initially, the trial court upheld the water service contract. On appeal, we found that the trial court erred by considering the value of water service to the county as a factor in reaching its decision. The matter was remanded to the trial court for a determination of whether the rate paid by Summit County is justified. On remand, the trial court held that the Summit County rates are not "unjust, unreasonable, or unfair."

Summit County appeals contending:

ASSIGNMENTS OF ERROR

"I. The trial court erred in entering judgment in favor of the City of Akron where Akron failed to meet its burden of presenting evidence to justify its discriminatory rate.

"II. The trial court erred in considering value of service and entering judgment in favor of the City of Akron, without additional evidence, contrary to this court's mandate and the law of the case.

"III. The trial court erred upholding the discriminatory water rate contrary to law and the equal protection standards required by the Ohio and United States Constitutions.

"IV. The trial court erred in upholding the discriminatory water rate for reasons which are not supported by the evidence."

All of these assignments of error are interrelated and challenge the propriety of the trial court's factual finding that the rate paid to Akron by Summit County is not unjustly discriminatory. The court will therefore address these assignments together.

Summit County and the City of Tallmadge are both wholesale bulk purchasers of Akron water for use outside the city limits of Akron. Summit County's allegation of unjust discrimination is based upon the fact that Tallmadge pays the "Akron rate" plus a ten percent surcharge, while the county has paid as much as the "Akron rate" plus a one hundred and five percent surcharge.

Akron does not deny that such a disparity between the two rates exists. Rather, Akron contends that Summit County negotiated various contractual benefits that are not received by Tallmadge. According to Akron, the additional benefits justify the disparate rate. We do not agree.

The Supreme Court of Ohio has held that the only restraints imposed by law upon a municipality's proprietary operation of a public utility are that the rates charged must be reasonable and there must be no unjust discrimination among the customers served, taking into account their situation and classification. *Orr Felt Co. v. Piqua* (1983), 2 Ohio St. 3d 166, 170-171. (Citations omitted). The rule against discrimination applies to rates fixed by contract with the purchaser. See *The Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544.

Courts and commentators generally agree that if a difference in rates is based upon a "reasonable and fair difference in conditions that equitably and logically justify a different rate, it is not an unjust discrimination." See 12 McQuillin, The Law of Municipal Corporations (3 Ed. Rev. 1986) 285-287, Section 34.101. (Citations omitted). While differences in conditions affecting the expense or difficulty of performing the service may fairly justify a difference in rates, discrimination may not be based upon the value of the service to the customer. *Id.*

In the case at bar, Summit County met its burden of providing sufficient evidence to demonstrate rate discrimination. On remand, it was incumbent upon Akron to show the existence of lawful conditions which justify the rate differential.

On remand, Akron had ample opportunity to introduce additional evidence. Instead, the city briefed the trial court on benefits received by Summit County and not received by Tallmadge. Assuming arguendo these differences exist, the record is devoid of any evidence tending to show that Akron encounters additional expense or difficulty attributable to the benefits that it provides to Summit County. The mere value of the benefits to Summit County, standing alone, is insufficient to justify the discriminatory rates.

SUMMARY

In so far as they are consistent with this opinion, Summit County's assignments of error are sustained. The judgment of the trial court is reversed and this case is remanded for further proceedings according to law on the other relief sought by the county.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ EDWARD J. MAHONEY
FOR THE COURT

QUILLIN, P. J.
CONCURS

GEORGE, J.
DISSENTS SAYING:

For the reasons stated in the dissenting opinion in *Fairway Manor, Inc. v. Akron* (1983), 13 Ohio App. 3d 233, I cannot agree with the majority.